Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
Implementation of Section 621(a)(1) of)
the Cable Communications Policy Act of 1984) MB Docket No. 05-311
as amended by the Cable Television Consumer)
Protection and Competition Act of 1992)

REPLY COMMENTS OF THE CITY OF ANAHEIM

These Comments are filed by City of Anaheim. As the Federal Communications Commission (FCC) reviews implementation of the Federal Communications Act, we are confident the Commission will hear from many cities as well as associations representing municipalities. No doubt, many of these entities will appeal to the FCC to maintain the status quo. We believe you will find Anaheim's comments different from most municipalities.

Anaheim believes that the rapid technological advancements of our day require changes to be made to the current regulatory environment with regard to video service providers. The current regulatory barriers have not kept up with the latest technology, and have the effect of slowing down or preventing the American consumer from either enjoying new technologies or receiving a better price on existing services which would result from the increased marketplace competition. Anaheim has set out a broader policy of dismantling outdated barriers to greater consumer choice, with the goal of eliminating franchise fees on these services as a relic of the past. In support of this belief, we wish to inform the Commission about the status of video franchising in our community and discuss why federal reform is needed.

Community Information

Anaheim is a city with a population of 345,317. Since 1979, the city of Anaheim has had a franchise agreement with various cable service providers, the most recent of which is with Adelphia Communications, and which in turn is being transferred to Time-Warner Communications.

In order to increase competition and provider greater options to our residents, the City recently reached an agreement with AT&T for the delivery of Internet Protocol Television (IPTV) to Anaheim residents. We believe this agreement is a model that shows the kind of local flexibility that an updated regulatory climate would further foster.

As you would expect, AT&T agreed to offset the city's cost of impact on local infrastructure. They do not escape any obligation to work with us scheduling or paying for the impact on streets as network enhancements are made under our roads. However, AT&T will not be required to pay the city a franchise fee, nor will the company be promised, either in writing on in effect, an exclusive right to provide Anaheim residents with IPTV.

The agreement between AT&T and Anaheim currently includes provisions to: (1) reimburse Anaheim for any direct costs associated with the project; (2) provide continued access to Channel 3, our local Public/Education/Government (PEG) channel; and (3) maintain consistency with the City's aesthetics, standards and procedures. This agreement is consistent with our overall policy described earlier.

Introduction and Summary

The City of Anaheim has expressed its commitment to provide innovative and robust communication options to its residents and businesses and to foster competition and capabilities, all without cost or liability to the City. City leaders do not believe that government should determine whether residents receive video content through established cable providers, growing competition from satellite television, or new concepts coming on line like internet protocol television (IPTV), or technologies on the horizon like Wi-Fi delivery of video content. Anaheim is supportive of maintaining open market competition in which any franchise fee is eliminated for consumers and a variety of service providers have an opportunity to earn customer support.

The current franchise system inhibits additional companies who might be subject to it from entering the marketplace and investing in infrastructure when they are challenged by the expense and difficulty of attaining enough market share to recoup costs. At the same time, companies that are clearly exempt from franchising, like satellite providers, flourish.

Franchise fees and many elements within franchise agreements, therefore, are merely an artificial intrusion by government into the consumer marketplace. Attempts to apply franchise fees and agreements to some providers, while exempting others, effectively eschews the market. Therefore, eliminating these fees and impediments, Anaheim contends, will allow equitable competition amongst the variety of video service providers. In this way, and without local government interference, the various systems compete in price, quality and quantity and consumers decide which service provider they prefer.

It is perhaps most instructive to examine the arguments made by supporters of the status quo and the reasons why these arguments are not valid, in Anaheim's experience.

ARGUMENT 1: "LOCAL GOVERNMENTS NEED PROTECTION FROM FISCAL HARM"

Many cities argue, essentially, that because they have gotten used to the revenue from franchise fees, they should be entitled to continue to receive them forever more, whether the original justification for the fee still makes sense. Historically, cities and cable providers have had a mutual interest in franchise agreements. Cities wanted systems built out to their whole territory, and the cable provider wanted protection of the investment they made for citywide deployment in order to have time to recoup their costs.

However, technology has passed these days by. Some video providers, by the nature of their technology, can bypass these outmoded models. For other potential providers, the ability to provide video entertainment content over their systems is a byproduct of upgrades they plan to make to their systems whereby they may provide other data services to potential customers. And, if they foreswore the ability to provide video entertainment (which would only hurt consumers) over their systems, municipalities would not have the ability to impose franchises.

The effect of all this in trying to apply a twenty-plus year old business model on today's technologies, cities are denying their consumers choice, unnecessarily raising the costs of such services, and stifling innovation.

In the past, local governments have been accustomed to using money brought in from the franchise fee to help pay for basic city services, such as public safety, traffic management and street and sidewalk preservation. But, in fact, cities have created an unfair tax on cable companies and limited competition in a fast-paced, competitive marketplace. Furthermore, many cities have used these fees to fund essential municipal services unrelated to cable, although the fees simply are not a long-term stable source of revenue for cities. As an example, just look at the emergence of satellite services. This, a non-taxed cable competitor, has increasingly taken a significant share of the entertainment market. As cable companies have lost customers to other competing entities, cities have seen a corresponding drop in the revenues that come from cable franchise fees. It is a weak fiscal model that subjects core municipal services such as public safety on a dwindling source of revenue, regulated by sources out of direct control of that municipality.

We question why new companies that can provide alternative video services to their residents outside the original intent of franchising should have to pay a franchise fee? If a company that wishes to do business in Anaheim does need to access government-owned land (for example, to upgrade networks under city roads, streets and other right-of-way), we already have the rights and protections to ensure that the company offsets any costs associated with the use (as we have done with AT&T's IPTV service agreement).

Argument 2: " Local Governments Need to Protect Their Control of Rights-of-Way"

Some local government officials want the federal government to protect their right to charge impact fees and rent for the use of public right-of-ways. That is well and good, but the concept of a franchise agreement is not necessary for a city to maintain control of their infrastructure.

In Anaheim's agreement with AT&T, they complied with existing state law, and with our local requests, for control over our right of way. They are to schedule any such digging up and replacement of right of way with us, and pay for the full cost, all without a franchise agreement.

If a company needs to use public-owned land for their service delivery infrastructure, it makes sense for the local government to negotiate a fee for the use of that property. However, local governments shouldn't have the power to prevent, effectively, other companies from entering in the marketplace. By the same token, if a private company wants to give away phone service in exchange for the use of publicly owned infrastructure, that shouldn't be prohibited. But local governments shouldn't be allowed to demand that a single company provide an array of free services in exchange for an effective monopolistic franchise, all the while preventing other companies from providing competitive service for their residents.

If a local government rents property or grants the use of a right-of-way, it is logical that representatives would ask for compensation as part of contract negotiations. Alternatively, city leaders can decide that they don't need to charge any fees for use, as the City of Anaheim did with our recent agreement with Earthlink, our Wi-Fi provider. Earthlink will be installing a Wi-Fi network throughout Anaheim, using city-owned streetlights and other infrastructure. The city is not charging a franchise fee, but Earthlink is not guaranteed a monopoly on wireless service in Anaheim. They simply contracted with the city to install a citywide system because our city council wanted to be sure that our residents could enjoy the benefits of wireless communication throughout our community.

In their responsibility as city leaders, local government representatives have an obligation to manage their city's rights of way in order to achieve the best benefit to residents and maximize public value. In addition, local governments are responsible for providing access to rights of way within their control in a fair and even-handed manner. In so doing, governments ensure that existing users of the rights of way are not unduly inconvenienced. We believe that when public rights of ways are responsibly managed, residents receive the best possible benefit, which includes receiving the most up-to-date technology with the greatest variety of choice. All of these goals can be achieved without strict franchising.

ARGUMENT 3: "LOCAL GOVERNMENTS NEED THE AUTHORITY OF FRANCHISE AGREEMENTS"

It has been argued that cities need the power of franchise agreements in order to provide education and government access channels, local emergency alerts and other public services. Some believe that private companies should be required to give free services for police and fire stations, schools and libraries in exchange for doing business with and in their city. But we don't believe that free services like these justifies allowing a single company to have a *de facto* monopoly on the market. Again with our IPTV agreement, we were able to request of AT&T that they carry our local Channel 3 (PEG), which they happily agreed to, without a franchise.

Conclusions

In the 21st century, technology is changing on nearly a day-to-day basis. To the extent that government needs to be involved in the marketplace in order to be responsible stewards of the public interest, government leaders at all levels should be working to create a regulatory environment that can nimbly respond to market changes that result from some new exciting technological breakthrough. In the past, competition has been stifled in the world of video services due to government regulations.

The City of Anaheim respectfully requests that the FCC implement reforms that allow the American consumer to benefit from increased competition in the marketplace, enjoying new delivery methods and potentially lower costs for those services. We invite the commissioners to visit our city and see a local community that is able to deliver top-quality video service without a franchise fee, giving its residents real choice in the marketplace.

Respectfully submitted,

City of Anaheim

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